UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 17-cr-20740
Hon. Gershwin A. Drain

(D-7) CARAUN KEY,

Defendant.
_____/

ORDER DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION TO LIMIT OR EXCLUDE TESTIMONY AND/OR CONDUCT A *DAUBERT* HEARING [#445] AND DENYING DEFENDANT'S MOTION TO PROHIBIT EVIDENCE REGARDING WEST VIRGINIA CONVICTION [#454]

I. INTRODUCTION

Defendant Caraun Key has been charged in a Third Superseding Indictment with RICO conspiracy, 18 U.S.C. § 1962(d). The Third Superseding Indictment alleges that Defendant and his Co-Defendants are members of the Smokecamp street gang, which is involved in criminal activities.

Presently before the Court is Defendant's Motion to Limit or Exclude Testimony and/or Conduct a *Daubert* Hearing, filed on March 20, 2019. Also, before the Court is Defendant's Motion to Prohibit Evidence Regarding his West

Virginia Conviction, filed on March 22, 2019. The Government has filed Responses in Opposition to both motions.

Upon review of the parties' briefing, the Court concludes that oral argument will not aid in the disposition of these matters. Accordingly, the Court will decide the instant motions on the briefs and will cancel the hearing set for May 20, 2019. *See* E.D. Mich. L. Cr. R. 12.1(a); E.D. Mich. L.R. 7.1(f)(2). For the reasons that follow, Defendant's Motion to Limit or Exclude Testimony and/or conduct a *Daubert* hearing will be denied without prejudice. Defendant's Motion to Prohibit Evidence Regarding his West Virginia Conviction will be denied.

II. FACTUAL BACKGROUND

Defendant is charged with 12 others for his role in a RICO gang conspiracy. At trial, the Government intends to introduce evidence of many of the gang members' social media postings, jail calls, and recorded conversations. Some of the statements include slang and jargon used by members of street gangs, as well as used by individuals involved with the illicit drug trade.

In 2015, Defendant, along with two of his Co-Defendants in this action, pleaded guilty in the United States District Court for the Northern District of West Virginia to aiding and abetting the possession of Oxycodone with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Defendant was sentenced to thirty months imprisonment. He was released on or about June 29,

2016 to a halfway house in West Virginia and then relocated to a halfway house in Detroit on or about October 10, 2016.

Trial in this matter is scheduled to commence on August 6, 2019. On February 26, 2019, the Government filed a trial brief which outlined the applicable authority for the use of expert testimony under Rule 702 of the Federal Rules of Evidence. The Government maintains that it has not yet determined whether it will call an expert witness under Rule 702, however it asserts that it will provide reasonable notice and information in advance of the August 6, 2019 trial should it decide to proceed with expert testimony.

III. LAW & ANALYSIS

A. Motion to Limit or Exclude Testimony and/or Conduct a Daubert Hearing

Defendant's present motion seeks a ruling from this Court ordering the Government to provide expert witness disclosure in compliance with Rule 16, exclude the proposed testimony and/or conduct a *Daubert* hearing. Because the Government has not yet decided whether it will introduce expert testimony on the meaning of slang and jargon used by the Defendant and his Co-Defendants, Defendant's present motion is premature.

"Courts frequently qualify law enforcement officers as expert witnesses under Federal Rule of Evidence 702 to interpret intercepted conversations that use 'slang, street language, and the jargon of the illegal drug trade." *United States v.*

Young, 847 F.3d 328, 350-52 (6th Cir.), cert. denied, 137 S.Ct. 2200 (2017); *United States v. Johnson*, 488 F.3d 690, 698 (6th Cir. 2007) ("Courts generally have permitted police officers to testify as experts regarding drug trafficking as long as the testimony is relevant and reliable.")

Additionally, an agent with personal knowledge can testify about coded language within a particular conspiracy under Rule 701. *See United States v. Edwards*, 707 F. App'x 332, 336 (6th Cir. 2017) ("law-enforcement officers who offer testimony under Rule 701—i.e., by interpreting recorded phone conversations—must specify the personal experiences that led the agent to obtain his or her information."); *Young*, 847 F.3d at 351 (holding that an agent who establishes "personal knowledge for his testimony" can properly testify to the jury about the meaning of "slang and jargon" used by the defendants). An agent can show personal knowledge by involvement "in the investigation since its inception," having "interviewed witnesses," "conducted surveillance," and reviewed many "hours of phone calls." I*d.*

Because the Government has not yet determined whether it intends to introduce expert testimony under Rule 702 or lay opinion testimony pursuant to Rule 701, Defendant's present motion is premature. The Court will therefore deny the present motion without prejudice so that Defendant may renew his request closer to the date set for trial.

B. Motion to Prohibit Evidence Regarding West Virginia Conviction

Defendant argues the Double Jeopardy Clause is implicated by the Third Superseding Indictment because the only overt acts attributable to him involve his West Virginia conviction for narcotics trafficking. Defendant also argues that even if there are no double jeopardy concerns, the introduction of his guilty plea to a drug-conspiracy in West Virginia will be unfairly prejudicial. Thus, he asks the Court to exclude from trial all evidence of his West Virginia conviction. The Government counters that there are no double jeopardy concerns in this case and evidence of Defendant's prior conviction is not unfairly prejudicial.

Double jeopardy questions are analyzed under the *Blockburger* test articulated by the Supreme Court: "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

In order for the Government to prove beyond a reasonable doubt that Defendant participated in a RICO conspiracy, the Government must prove: (1) An enterprise existed; (2) the Defendant was associated with the enterprise; (3) the Defendant knowingly agreed to conduct or participate in the affairs of the enterprise; (4) the Defendant and at least one other conspirator agreed to engage in a pattern of racketeering activity, that is commit at least two acts of racketeering, in

furtherance of the enterprise; and (5) the enterprise engaged in, or its activities affected, interstate commerce. *Salinas v. United States*, 522 U.S. 52, 61-66 (1997).

Defendant's prior conviction for having aided and abetted the possession of oxycodone with the intent to distribute required the following elements to be established: (1) the crime of possession of oxycodone with the intent to distribute was committed; (2) the Defendant helped to commit the crime or encouraged someone else to commit the crime; (3) the Defendant intended to help commit or encourage the crime. Sixth Circuit Pattern Jury Instruction 4.01. In order to be convicted of possession of oxycodone with the intent to distribute required proof of the following: (1) the oxycodone was knowingly possessed; and (2) the individual possessing the oxycodone intended to distribute it. Sixth Circuit Patten Jury Instruction 14.01.

Comparing the RICO offense with the narcotics offense reveals that each crime contains an element that the other does not. A conviction for RICO conspiracy does not require proof of knowing possession of oxycodone with the intent to distribute, while Defendant's narcotics conviction did not require proof of the existence of an enterprise. Courts that have confronted similar challenges have quickly dispensed of them. *See, e.g., United States v. Russell*, No. 16-CR-20460, 2017 U.S. Dist. LEXIS 88336, *6 (E.D. Mich. Jun. 8, 2017) ("An examination of both offenses shows that each contains an element that the other does not. For

example, a racketeering conspiracy does not require knowing possession of a controlled substance, while aggravated possession of drugs does not require the existence of a criminal enterprise."); *United States v. Sutton*, 700 F.2d 1078, 1081 (6th Cir. 1983) (finding no double jeopardy problem with cumulative punishments for 18 U.S.C. § 1962 and 21 U.S.C. § 841 and noting that the "clear legislative intent expressed concurrently with the enactment of RICO is to permit, perhaps even encourage, courts to impose cumulative sentences for RICO offenses and the underlying crimes."); *United States v. Evans*, 951 F.2d 729, 735-36 (6th Cir. 1991) (no double jeopardy violation in continuing criminal enterprise prosecution following earlier drug conspiracy conviction). Defendant's double jeopardy concerns are without merit.

As to Defendant's second argument that introducing his West Virginia conviction will be unfairly prejudicial, the Court concludes that this evidence is highly relevant and not unfairly prejudicial. Courts routinely admit evidence of relevant prior convictions in subsequent RICO prosecutions. *See United States v. Napier*, 884 F.2d 581, 1989 U.S. App. LEXIS 13228, *6 (6th Cir. Sept. 1, 1989) ("This Court has expressly held that prior convictions may be used to obtain a RICO conviction and that such use does not violate the bar against double jeopardy.") (citing *United States v. Licavoli*, 725 F.2d 1040, 1050 (6th Cir.), cert. denied, 467 U.S. 1252 (1984)); *United States v. Link*, 921 F.2d 1523, 1529 (11th

Cir. 1991) ("Evidence of both the plea agreement and the convictions were introduced at the subsequent trial to prove the predicate racketeering acts."); *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990) (affirming introduction of prior judgments of conviction as evidence of predicate acts in RICO prosecution); *United States v. Tocco*, 200 F.3d 401, 418 (6th Cir. 2000) (affirming introduction of certified records of co-defendants' convictions to prove predicate acts of a RICO charge).

Accordingly, based on the well-settled authority, there is no basis to exclude evidence of Defendant's West Virginia conviction.

IV. CONCLUSION

For the reasons articulated above, Defendant Caraun Key's Motion to Limit or Exclude Testimony and/or Conduct a *Daubert* Hearing [#445] is DENIED WITHOUT PREJUDICE.

Defendant Caraun Key's Motion to Prohibit Evidence of West Virginia Conviction [#454] is DENIED.

SO ORDERED.

Dated: May 14, 2019

/s/Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on May 14, 2019, by electronic and/or ordinary mail.
/s/ Teresa McGovern
Deputy Clerk